

New Hampshire Supreme Court  
May 5, 2005  
Oral Argument Case Summaries

**Case #1**

**STATE OF NEW HAMPSHIRE V. Abbott Place, No. 2004-0495**

Attorney Chris McLaughlin for the appellant, Abbott Place (10 minutes)  
Attorney Susan McGinnis for the appellee, State of New Hampshire (10 minutes)

**Legal Issues Presented:**

Simple assault; mutual combat simple assault; immunity from prosecution; preservation of issues

**What is this case about?**

- Was the trial court's decision to deny the defendant's request for "mutual combat simple assault" jury instruction an abuse of discretion?
- Was the defendant prejudiced because the jury was not instructed on mutual combat simple assault?

**Procedural History**

A trial court jury found the defendant guilty of simple assault. The defendant has taken his case to the Supreme Court and asked that he be allowed to return to the trial court for a new trial with jury instructions that include mutual combat simple assault.

**Statement of Facts**

On October 31, 2003, the defendant and his wife were arguing over the amount of Halloween candy she was handing out to trick-or-treaters. The defendant, who "had drunk a couple of beers at work" before his wife picked him up, was drinking a beer while sitting in the kitchen. The defendant and his wife continued to argue and the words escalated to the point where she said something and then hit the defendant. As his wife turned to leave the room, the defendant hit her in the back and shoved her. The defendant's wife fell, suffering minor injuries. The defendant did not verbally threaten or physically contact his wife after she fell.

A police officer patrolling the neighborhood on a mountain bike received a call and responded to the scene. As the officer neared the condominium, he

could hear a female voice screaming. Upon entering the condominium unit, the officer found the defendant breathing heavily and appearing agitated, standing in the dining area to the right of the kitchen amidst leaves, an overturned chair, and items from the wall that had been knocked to the floor. The defendant told the officer that “he had gotten into a fight with his wife and son.” In the course of their conversation, the officer noticed that the smell of alcohol was on the defendant’s breath and he was slurring his speech. The defendant next went outside to talk with other officers who had arrived at the condominium. One of the officers watched the defendant stagger outside before leaning against a vehicle to maintain his balance. That officer also found the defendant’s speech to be slurred and difficult to understand. When the defendant was arrested, he continued to show poor balance, bumping against the police cruiser as he was handcuffed. Upon arrival at the police station, the defendant requested that the officers photograph his injuries, but there was no indication that they had been caused by his wife.

The defendant was charged with simple assault. At trial, he requested that the judge instruct the jury on mutual combat simple assault; the judge refused to give the requested instruction finding that there was “no evidence in the case from which a reasonable jury could find that there was an agreement to engage in an altercation.” On the basis of testimony provided by his wife, who received immunity from prosecution for her assault against the defendant, the defendant was convicted.

On appeal, the defendant argues that the trial court erred when it refused to instruct the jury on mutual combat simple assault. The defendant contends that evidence of his wife’s conduct allows the court to infer that she implicitly agreed to fight, thereby consenting to physical contact with the defendant. The defendant argues that because the parties agreed to fight, the jury must receive instruction on mutual combat simple assault. The defendant argues that he is entitled to a new trial because the jury was improperly instructed and denied the opportunity to decide if the defendant’s act was an assault or act of self-defense.

The State argues that the trial court correctly denied the defendant’s request for jury instruction on mutual combat simple assault. The State reasons that because there is no evidence demonstrating that the defendant’s wife consented to a fight with the defendant, there is no basis for providing the instruction. Furthermore, the State notes that in the process of finding the defendant guilty of simple assault, the jury found that the defendant’s conduct was unprivileged. Therefore, the State argues, the defendant was not prejudiced by the omission of the jury instruction. The State recognizes that the defendant references state and federal constitutional rights, but argues that they need not be considered because they are unpreserved. Additionally, the State argues that because the defendant does not ask whether mutual combat simple assault is a defense or a mitigating factor, this issue should be decided in another case that is currently pending before this Court.

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**Case #2**

**STATE OF NEW HAMPSHIRE v. ALFRED GERO, No. 2004-0331**

Attorney James Davis for the appellant, Alfred Gero (15 minutes)  
Attorney Stephen LaBonte for the appellee, State of New Hampshire (15 minutes)

**Legal Issues Presented:**

Criminal Threatening; felony; misdemeanor; public interest; personal property rights; trial court discretion

**What is this case about?**

- If the police reduce a charge in exchange for a guilty plea from the defendant, can the police still seize and destroy property (e.g., weapons) that would have been related to the original charge?
- Does the public interest require that the police destroy firearms and ammunition seized from a defendant who has been convicted of a domestic violence misdemeanor?
- Can a guilty party prevent police from destroying seized personal property on the basis that the property has monetary and sentimental value?

**Procedural History**

The trial judge issued an order that transferred four of the firearms to the appellant/defendant's brother and two to the appellant/defendant's son, while ordering that the rest of the firearms and ammunition be destroyed. Alfred Gero and his lawyer have taken this matter to the Supreme Court and asked that the seized property be released to the defendant's brother, Paul Gero.

**Statement of Facts**

On February 9, 2002, the defendant stood near his gun cabinet and told his girlfriend and some of her assembled family members that he would "blow them away." At the time that he said this, the defendant had one of his guns out from the cabinet. The defendant, who owned approximately 24 firearms

and associated ammunition that he stored in his home, was arrested by the police. In the course of the arrest, the police seized the defendant's firearms and ammunition.

Initially, the defendant was indicted for the Class B felony of criminal threatening "by means of a deadly weapon." However, in exchange for a guilty plea, the State agreed to reduce the defendant's charge to a Class A misdemeanor, which does not allege use of a weapon.

On January 21, 2004, the State submitted a Motion to Destroy Seized Property Pursuant to RSA 595-A:6. RSA 595-A:6 directs that lawfully seized property be returned to the owner, sold or destroyed, whichever "the public interest requires." The defendant objected because some of the firearms were family heirlooms alleged to have significant monetary and sentimental value. The defendant asked that the firearms and ammunition be transferred to his brother, Paul Gero. Paul Gero holds a Bill of Sale for the firearms, given to him by the defendant. The trial court ordered that the defendant's brother receive four guns, including two that belonged to the brother but were stored by the defendant and two that were family heirlooms. Additionally, two air rifles were returned to their proper owner, the defendant's son. These transfers were made on the condition that they be kept by the receiving parties and that the defendant be denied access to the guns. The trial court ordered that the remaining firearms and ammunition be destroyed on the basis that such a result was required by the public interest.

The defendant argues that the trial court exercised "unsustainable discretion" in ordering the destruction of property that is not contraband and was not used by the defendant in the commission of his crime. For these reasons, the defendant contends that there is no reason to destroy the property and that doing so would be contrary to his private property rights under the state and federal constitutions. Additionally, the defendant argues that the public interest does not require the taking of his private property. Finally, the defendant argues that his substantive due process rights have not been protected because his private property rights have been ignored.

The State, meanwhile, argues that the defendant has failed to meet his burden of demonstrating that the trial court exercised an "unsustainable exercise of discretion" when it ordered the destruction of his firearms. This determination is made by reviewing the support in the record. The State notes that under RSA 595-A:6, the trial court has discretion to dispose of seized items when doing so is in the public interest. The court determines the "public interest" by considering the public need and the rights of the individual involved with the matter. Furthermore, the State observes that the defendant can no longer legally possess a firearm under 18 U.S.C. § 922(g)(9) (2000) because he has been convicted of a domestic violence misdemeanor. Also, under RSA 173-B:5 (2000), the defendant was prohibited from possessing a firearm at the time of the trial court's hearing because he was party to a domestic violence restraining order. Accordingly, the State reasons that his private interest is minimal. The State also notes that the defendant's due process rights have not been violated because the lower court's order to destroy

the firearms is rationally related to the public interest in denying the defendant future access to firearms. Finally, the State argues that while the defendant was not charged with an offense involving a deadly weapon, the firearms can be seized and destroyed because they were related to the threats he made when he committed his class A misdemeanor offense.

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